SIVALINGAM PERIASAMY

v.

PERIASAMY & ANOR.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' MAHADEV SHANKAR JCA
DATUK AHMAD FAIRUZ SHEIKH ABD. HALIM J
[CIVIL APPEAL NO: P-01-11 OF 1995]
4 SEPTEMBER 1995

CIVIL PROCEDURE: *Judgment - Interference by appellate Court - Principles - Evaluation of evidence - Whether totality of evidence not properly assessed - Whether trial Court has so fundamentally misdirected itself - Erroneous judicial reasoning by trial Judge - Whether sufficient ground for reversal of decision.*

This was an appeal against the dismissal of a claim for damages for personal injury. The appellant was at the material time a detainee at the Pulau Jerejak Detention Camp. The facts were that, whilst under the supervision of a prison warden (Samy), in the vicinity of the camp, the appellant climbed a coconut tree from which he fell, sustaining severe spinal injuries as a result. In the ensuing claim for damages for personal injury, the appellant testified that Samy had ordered him to climb the tree, and that he obeyed the order because disobedience would result in dire consequences. This evidence had not been challenged by the defence. Evidence had also been put that the plaintiff was a man who had never disobeyed the orders given him, including those given by Samy. This piece of evidence was also not challenged by the defence. However, despite the unchallenged evidence, the defence had put up a story that in climbing the coconut tree, the plaintiff had wilfully disobeyed the express order of Samy. The learned Judge, somehow, preferred the defence story and consequently rejected the claim. In this appeal, *inter alia* a question arose as to whether the Court below, in deciding the way it did, had so misdirected itself that its decision cannot be allowed to stand.

Held:

Per Gopal Sri Ram & Mahadev Shankar JJCA (delivering the judgment of the Court):

[1] A careful reading of the trial Judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the defence witnesses is based upon a wrong premise and does not accord with well established principle that goes to form the fulcrum upon which the scales of procedural justice turn.

[2] The trial Judge had completely overlooked the inherent probabilities of the case. Bearing in mind the unchallenged evidence that the plaintiff was a person who had a history of following orders given him by those who held him in custody, the question which the trial Judge ought to have asked is whether it was inherently probable that the plaintiff, on this isolated instance, would have dared disobey an express order given him not to climb the tree. Had the learned Judge done so, he would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

[3] This Court is under a duty to intervene in a case where, as here, the trial Court has so fundamentally misdirected himself, that one may safely say that no reasonable Court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[4] The judgment of the trial Court was also defective in that it accepted the evidence of the defendant upon a critical issue which was never put to the appellant during his cross-examination. The main thrust of the defendants's case was that the plaintiff had requested the first respondent's permission to climb the tree which the first respondent refused. But nowhere in the defence was it alleged that there was such a request. Further, it was never put to the plaintiff under cross-examination that such a request had come from him. The trial Judge ought to have taken this failure into account when he came to assess the evidence.

[Appeal allowed. Judgment for appellant in agreed quantum of RM135,000 and costs of RM10,000]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Penghakiman - Gangguan oleh Mahkamah Rayuan - Prinsip-prinsip - Penilaian keterangan - Samada keseluruhan keterangan tidak dinilaikan dengan betul - Samada Mahkamah perbicaraan telah dengan secara pentingnya tersalah arah akan dirinya sendiri - Kesilapan alasan kehakiman oleh Hakim perbicaraan - Samada mencukupi untuk mengakas keputusan.*

Ini adalah satu rayuan terhadap penolakan tuntutan untuk gantirugi bagi kecederaan diri. Perayu adalah pada waktu yang material merupakan orang tahanan di Kem Tahanan Pulau Jerejak. Fakta-faktanya adalah bahawa, ketika di bawah penyeliaan seorang waden penjara (Samy), dalam perkarangan kem tersebut, perayu telah memanjat sebatang pokok kelapa daripada mana beliau telah terjatuh, dan akibatnya telah mengalami kecederaan pada tulang belakang yang amat teruk. Dalam meneruskan tuntutan untuk gantirugi bagi kecederaan diri, perayu telah memberi keterangan bahawa Samy telah memerintahnya untuk memanjat pokok itu, dan bahawa beliau telah mematuhi perintah itu kerana ketidak-patuhan akan membawakan akibat yang teruk. Keterangan ini telah tidak

dicabar oleh pembelaan. Keterangan juga telah dikemukakan bahawa plaintif adalah seorang yang tidak pernah mengingkari perintah yang diberikan padanya, termasuk perintah yang diberikan oleh Samy. Keterangan ini telah juga tidak dicabar oleh pembelaan. Namun begitu, sungguhpun keterangan tersebut tidak dicabar, pihak pembelaan telah mengemukakan cerita bahawa ketika memanjat pokok kelapa tersebut, plaintif telah sengaja mengingkari arahan nyata Samy. Hakim yang bijaksana telah menerima cerita pihak pembelaan dan akibatnya telah menolak tuntutan tersebut. Dalam rayuan ini, antara lainnya, persoalan berbangkit mengenai samada Mahkamah di bawah, dalam membuat keputusan di atas, telah melakukan satu salah-arah yang sangat berat sehinggakan keputusannya itu tidak boleh dipertahankan.

Diputuskan:

Oleh Gopal Sri Ram & Mahadev Shankar HHMR (menyampaikan penghakiman Mahkamah):

[1] Meneliti penghakiman Hakim perbicaraan jelas bahawa proses alasan yang digunakan oleh beliau bilamana memilih keterangan saksi pembelaan adalah berdasarkan premis yang salah dan tidak menuruti prinsip-prinsip yang telah lama digunakan yang membentuk fulkrum di atas mana skala prosedur keadilan berputar.

[2] Hakim perbicaraan telah sesungguhnya tidak memberikan perhatian kepada kebarangkalian yang sedia ada bagi kes tersebut. Dengan memikirkan keterangan yang tidak dicabar bahawa plaintif adalah seorang yang mempunyai sejarah selalu menuruti perintah-perintah atau arahan-arahan yang diberikan padanya oleh mereka yang menahannya dalam jagaan, soalan yang Hakim perbicaraan sepatutnya tanya adalah samada ianya mungkin bahawa plaintif, dalam kes yang satu ini, akan berani mengingkari satu arahan nyata yang diberikan padanya supaya tidak memanjat pokok itu. Sekiranya Hakim yang bijaksana telah berbuat sedemikian, beliau akan, di atas satu penilaian yang wajar akan keseluruhan keterangan tersebut, membuat keputusan bahawa cerita pembelaan adalah secara keseluruhan tidak dapat diterima.

[3] Mahkamah ini berkewajipan untuk mengganggui dalam sesuatu kes di mana, sepertimana keadaan di sini, Mahkamah perbicaraan telah, dengan secara yang fundamental, tersalah arah akan dirinya sendiri, hinggakan seseorang boleh dengan selamatnya menyatakan bahawa tidak terdapat mana-mana Mahkamah yang bertindak secara wajar, dan yang telah dengan betulnya mengarahkan dirinya sendiri dan menanyakan soalan-soalan yang betul, akan mencapai keputusan yang sama.

[4] Penghakiman Mahkamah perbicaraan juga cacat kerana ianya telah menerima keterangan defendan mengenai satu isu yang kritikal yang mana tidak pernah dikemukakan kepada perayu ketika pemeriksaanbalas.

Dorongan utama kes defendan adalah bahawa plaintif telah meminta kebenaran responden pertama untuk memanjat pokok tersebut yang mana ditolak oleh responden pertama. Tetapi tidak terdapat di mana-mana pun dalam pembelaan yang mengatakan bahawa terdapat permintaan yang sedemikian. Selanjutnya, ianya tidak pernah dikemukakan kepada plaintif di bawah pemeriksaanbalas bahawa permintaan sedemikian telah datang daripada beliau. Hakim perbicaraan seharusnya mengambilkira kegagalan ini ketika beliau menilaikan keterangan tersebut.

[Rayuan dibenarkan. Penghakiman untuk perayu dalam kuantum yang dipersetujui sebanyak RM135,000 dan kos sebanyak RM10,000]

Cases referred to:
The Eurymedon [1943] 73 LL.L Rep. 217 ***(foll)***
Onnasis & Anor. v. Vergottis [1968] 2 Llyods Rep. 403 ***(foll)***
Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen & Ors. [1995] 2 MLJ 770 ***(foll)***
Browne v. Dunn [1893] 6 R.67 ***(foll)***

For the appellant - Dalgit Singh (Harbans Singh with him); M/s. Gurdev Dalgit Su & Co.
For the respondent - Syed Marzidy (Mazni Buang with him); M/s. Jabatan Peguam Negara

JUDGMENT

Gopal Sri Ram & Mahadev Shankar JJCA:

This is an appeal against the dismissal of a claim for damages for personal injury. The appellant is referred hereafter as the plaintiff.

On 17 November 1976 the plaintiff was a detainee at the Pulau Jerejak Detention Camp. The first defendant (hereafter referred to as Samy) was a Prison Warden holding the rank of Corporal. It is common ground that whilst under the supervision of Samy, the plaintiff climbed a coconut tree from which he fell, sustaining severe injury to his spinal cord with resulting paralysis of both legs and loss of bladder and bowel control.

The plaintiff testified that he had no experience in climbing coconut trees. He said that on the day in question he and his brother and another two detainees, one of whom named Rajendran were called out by Samy to do some work in the immediate vicinity of a Hindu "Temple". On reaching the "Temple", the plaintiff said that Samy ordered him to climb the tree and pluck the coconuts. The plaintiff said that the discipline in the camp was such that disobedience attracted severe punishment. So he climbed the tree as instructed but he lost his hold in the course of plucking the coconuts and fell to the ground. The plaintiff's brother also gave evidence confirming that such an order was given. The plaintiff also called Rajendran who could not confirm whether he personally heard the order by Samy to the plaintiff, but otherwise corroborated the rest of the plaintiff's evidence.

For the defence a number of senior officers were called to testify that it was common knowledge that detainees were not permitted to climb trees in the Detention Camp. Samy himself said that on the days in question he only called out two persons, namely the plaintiff and his brother. On arrival at the "Temple" he said, the plaintiff had asked him permission to climb the tree in order to pluck coconuts for his brother but he refused this request. He then ordered both of them to clean the "Temple" compound. He himself washed the "Temple" idol. He then said that he only noticed the plaintiff when the plaintiff was on top of the tree and the coconuts started to fall whereupon he ordered the plaintiff to come down carefully. Immediately after this the plaintiff fell down.

This so called "Temple" was only a shrine with a short plank wall of about three to four feet in height around it. Samy's evidence was that he was only about 13 feet from the tree and the height of the tree between 12 - 18 feet. It is the duty of a Prison Warden to maintain close surveillance of the detainees in his custody. It is impossible to expect that from a distant of 13 feet Samy would not have been aware of the movements of the plaintiff. Furthermore if the alleged request had been made and refused, the plaintiff's ascent must have been executed in total defiance of an immediate order. The official record showed that the plaintiff up to that point had never had a single act of disobedience recorded against him.

Compelled to choose between these two conflicting versions, the learned trial Judge preferred Samy's version and found that the plaintiff, in defiance of orders, had voluntarily climbed the tree of his own accord and was therefore not entitled to recover.

We are fully conscious that this is an appeal that turns upon a question of fact. However, a careful reading of the trial Judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the defence witnesses is based upon a wrong premise and does not accord with a well settled principle that goes to form the fulcrum upon which the scales of procedural justice turn.

First, the trial Judge appears to have completely overlooked the inherent probabilities of the case. Evidence was led to prove that the plaintiff was a person who had a history of following orders given him by those who held him in their custody, including the first respondent. Indeed the plaintiff testified, without challenge, of the dire consequences that would ensue from disobedience. All this evidence was entirely accepted by the defendants. Yet, the defendants' case was that on this occasion the plaintiff had wilfully disobeyed an express order given him. The question which the trial Judge ought to have asked himself is whether it was inherently probable that the plaintiff, on this isolated instance, would have dared disobey an express order given him not to climb the tree. Had he done so, he would, upon a proper assessment of the totality

of the evidence, have come to the conclusion that the defence story was wholly improbable.

So, here we have a case where there was insufficient judicial appreciation by the trial Judge of the evidence of circumstances placed before him. And of the principles that should govern such a case as the present there is no doubt.

It is trite law that this Court will not readily interfere with the findings of fact arrived at by the Court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial Court has so fundamentally misdirected itself, that one may safely say that no reasonable Court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

In a case such as this, where the task of the Court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words Viscount Simon (who was in the majority) in *"The Eurymedon"* [1943] 73 LL.L Rep. 217:

> The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. (Which, we hasten to add, is not the case). I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. **If it could be shown that the course or events affirmed by the learned Judge could not have occurred, that would be an excellent reason for reversing his view** – in these mundane happenings there is no more conclusive argument than *non est credendum quia impossibile*. **If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.**
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> If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed. (Emphasis added.)

In the same case, Lord Atkin, while recording a vigorous dissent, said (at p. 220):

> My Lords, this is an appeal from the Court of Appeal, who affirmed a decision of Langton, J, holding that in a collision between the *Eurymedon*, belonging to the appellants, and the *British Reliance*, belonging to the respondents, the *Eurymedon* was alone to blame. The learned Judge, of course, saw the witnesses, and had that initial advantage which, as I have said elsewhere, an appeal tribunal can never recapture. But Judges have before this been mistaken in their acceptance of witnesses' stories; and if the appellate tribunal is satisfied that a mistake has been made, I apprehend that it is their duty to say so. An appellate Court in this country proceeds to consider an appeal by way of rehearing: on the rehearing it is equally charged with the task of doing justice between the parties. The Judge may have accepted the evidence of one party on a general

> survey of all the facts, weighing the probabilities; he may even accept evidence in spite of improbability from a conviction, after watching demeanor, that a particular witness has told the truth, and that a witness or witnesses to the contrary have not. In the latter case the burden of an appellant is heavy, but it is not insupportable. The appellate Court has still to determine the issue between the parties and may feel constrained to hold that the Judge's estimate of the witnesses is mistaken. It is, in my opinion, a mistake to suppose that the decision of this House in the *Hontestroom*, [1927] AC 37, laid down as a proposition of law that an appellate tribunal must in all cases accept the findings of a trial Judge where he purports to base these on his belief in the credibility of particular witnesses. No Court can so restrict its statutory jurisdiction; and in these days, where civil cases involving important questions of credit and reputation and even of liberty are determined by a Judge alone, it is of great importance that the full jurisdiction should be maintained.

Again, in *Onnasis & Anor v. Vergottis* [1968] 2 Lloyds Rep. 403, 430, Lord Pearce dissenting speech contains the following valuable reminder:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: But the fact that the right party seems to have succeeded in the Court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

We now turn to consider the second defect in the judgment of the trial Court. The learned Judge accepted the evidence of the first defendant upon a critical issue which was never put to the appellant during his cross-examination.

The main thrust of the defendants' case was that the plaintiff had requested the first respondent's permission to climb the tree which the first respondent refused. The plaintiff's case, on the other hand, was that he had been instructed by the first defendant to make the climb. But nowhere in the defence was it alleged that there was such a request as alleged in the evidence. Further and more importantly, it was never put to the plaintiff under cross-examination that such a request had come from him. The trial Judge ought to have taken this failure into account when he came to assess the evidence. But nowhere in his judgment is there any indication that he did so. In *Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen & Ors.* [1995] 2 MLJ 770, 774, this Court when applying the rule in *Browne v. Dunn* [1893] 6 R67 said:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence

of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

We are satisfied that if the learned Judge adopted the correct approach to the evaluation of evidence, we have no doubt that he would have found for the plaintiff.

Accordingly our judgment was that the plaintiff was entitled to recover. Quantum having been agreed, we made an order that the plaintiff do recover the sum of RM135,000 inclusive of interest and agreed costs of RM10,000. We also ordered the deposit to be refunded to the appellant.

Reported by W.A. Sharif